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No. 85-993

IN THE

Supreme Court of the United States

October Term, 1985

PAULA A. HOBBIE,

Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY,

Appellees.

On Appeal From the District Court of Appeal of the State of Florida Fifth District

BRIEF OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

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INTEREST OF THE AMICI

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise Clauses. To further these ends, AJCongress has filed briefs amicus curiae in numerous cases in state and federal courts in which the meaning of the Religion Clauses has been at issue.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members. It was founded over 60 years ago and is dedicated to defending and preserving the principles embodied in the Bill of Rights.

The ACLU has been involved in many of the leading First Amendment cases in which Free Exercise rights have been threatened.

This brief is submitted with the consent of the parties.

STATEMENT OF THE CASE

Appellant Paula Hobbie ("Hobbie") was an assistant manager of a jewelry store in Florida, one of a chain of jewelry stores owned by appellee Lawton and Company ("Lawton"). Lawton's corporate policy required that assistant managers and managers be present in the stores on Friday nights and Saturdays, the times of heaviest sales.

In May 1984, more than two years after she began working for Lawton, Hobbie became a Seventh Day Adventist. Hobbie promptly informed her immediate supervisor, the store manager, that her new found religious beliefs prohibited her from working on Friday nights and Saturdays[1]. Notwithstanding Lawton's corporate policy, Hobbie and her supervisor worked out an arrangement by which he worked Friday nights and Saturdays, and Hobbie worked Sundays.

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[1] The sincerity of Hobbie's religious beliefs is not questioned.

Although this arrangement apparently worked out well for several weeks, it soon came to the attention of the store manager's supervisor. He ordered Hobbie and the store manager she worked for to end their arrangement, advising them that Lawton's corporate policy permitted no exceptions to the Friday night and Saturday work rule. Hobbie refused to work on her Sabbath and so Lawton, apparently without making any effort whatsoever to accommodate Hobbie's Sabbath observance, fired her.

Shortly thereafter, Hobbie filed a claim with the Florida Department of Labor and Employment Security for unemployment benefits. Lawton contested payment of unemployment benefits, and they were denied pursuant to Florida Statute § 443.101(1)(a), because Hobbie's refusal to work on her Sabbath constituted "misconduct connected with work."

The Appeals Referee of the Florida Department of Labor and Unemployment Security - Unemployment Compensation Appeals Bureau affirmed the denial of Hobbie's unemployment benefits holding (without citation to supporting authority) that

> the law cannot be readily construed to require an employer to discriminate against other employees in order to enable others to observe their Sabbath. In view of the testimony ... it must be held that the claimant was discharged from the job for misconduct connected with the work when she refused to work the hours scheduled for her.

Hobbie appealed the Referee's order to the Unemployment Appeals Commission ("Commission") which affirmed the Referee's decision without opinion. Hobbie appealed the Commission's order to the District Court of Appeal of the State of Florida, Fifth District, which affirmed the Commission's order, also without opinion, per curiam. This appeal followed.

SUMMARY OF ARGUMENT

Denying unemployment benefits to appellant Hobbie, who was fired because she refused to violate her religious beliefs against working on her Sabbath, constitutes a violation of the Free Exercise Clause. As the Court has held in two decisions directly controlling this case, Sherbert v. Verner and Thomas v. Review Board, the state burdens religion when it denies an important benefit because of conduct mandated by religious beliefs. When, as in this case, the state has made no showing that the interests in support of the denial of benefits are compelling, the state is unconstitutionally infringing upon free exercise.

The applicability of Sherbert and Thomas to th s case is not affected by this Court's recent decision in Bowen v. Roy. Nor is this case distinguishable from Sherbert and Thomas merely because Hobbie's

religious awakening took place during the course of her employment.

Finally, permitting Hobbie unemployment benefits would no more establish religion than did the Court's requiring payment of such benefits in Sherbert and Thomas. The Court's decision in Estate of Thornton v. Caldor does not suggest otherwise.

ARGUMENT

DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TO AN EMPLOYEE WHO IS FIRED FOR REFUSING, FOR REASONS OF RELIGIOUS CONSCIENCE, TO FOLLOW HER EMPLOYER'S CORPORATE POLICY, REQUIRING WORK ON FRIDAY NIGHT AND SATURDAY, VIOLATES THE FREE EXERCISE CLAUSE

As a Sabbatarian, Hobbie was unable to comply with her employer's corporate policy requiring work on Friday night and Saturday, and she was fired for that refusal. Notwithstanding Hobbie's arrangement with her supervisor to cover for her absence, and the lack of record evidence indicating that her absence caused her employer harm, the Commission affirmed a denial of unemployment compensation benefits for Hobbie. It held that her refusal to follow corporate policy constituted "misconduct connected with work," pursuant to Florida Stat. § 443.101 (1983).

That holding is plainly erroneous. Almost 40 years ago, this Court held that no person may be required to choose between exercise of a First Amendment right and participation in an otherwise available public program, because no state is permitted, for less than a compelling reason, to:

> exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

Everson v. Board of Education, 330 U.S. 1, 16 (1949) (emphasis deleted). Florida Stat. § 443.101, construed and applied to require forfeiture of benefits by an employee who refuses, for reasons of religious conscience, to conform strictly to her employer's rules -- while allowing payments

for those asserting other personal reasons -- impermissibly restricts that employee's religious liberty.

A. This Case Is Controlled by Sherbert v. Verner and Thomas v. Review Board

In Sherbert v. Verner, 374 U.S. 398 (1963), this Court addressed the question of whether a Seventh Day Adventist could be denied unemployment benefits after she was discharged by her employer for refusing to work on her Sabbath. She was unable to obtain other work because her religious beliefs prohibited work on Saturdays. Unemployment compensation benefits were denied under the South Carolina statute because, as a result of her unavailablity for Saturday work, she "failed, without good cause ... to accept suitable work when offered...."

This Court declared the disqualification statute, as applied to Sherbert, unconstitutional. The Court concluded that the withholding of benefits interfered with free exercise to the same extent as a fine imposed for Saturday worship. It rejected the bare assertion, unsupported by any evidence, that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might dilute the unemployment compensation fund and burden the scheduling by employers of necessary Saturday work. Rather, it held that it would be incumbent on the state to demonstrate that no alternative form of regulation would combat such abuses without infringing First Amendment rights. The state was unable to make any such demonstration.

Eighteen years later, the Court reaffirmed the Sherbert holding in Thomas v. Review Board, 450 U.S. 707 (1981). In Thomas, a Jehovah's Witness was denied unemployment benefits after he refused to work for an employer who was engaged directly in the production of armaments. Although Thomas initially worked in his employer's steel foundry, which fabricated sheet steel for a variety of uses, the foundry was closed, and the only jobs remaining involved weapons production, which he could not participate in as a matter of religious conscience.

The Court reasoned that "as in Sherbert, the employee was put to a choice between fidelity to religious belief or cessation of work...." 450 U.S. at 717. The Court held, therefore that:

> where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717-18.

Echoing Sherbert, Chief Justice Burger's majority opinion in Thomas concluded that none of the interests advanced by the state in support of the denial of unemployment compensation benefits (to avoid widespread unemployment and consequent burden on the system if people left jobs for "personal" reasons and to avoid detailed probing by employers into job applicants' religious beliefs) were sufficiently compelling to justify the burden on Thomas' religious liberty. Id. at

718-19. Accordingly, the Court held that Thomas was unconstitutionally deprived of unemployment compensation benefits.

Hobbie's dilemma is indistinguishable from the difficult choices faced by the plaintiffs in Sherbert and Thomas. Hobbie, like Sherbert and Thomas, could not continue her employment because to do so would violate her religious precepts.

In Sherbert, the employee was dismissed when the plant added a Saturday shift. In Thomas, the employee resigned when his work changed to weapons production. Here, Hobbie was dismissed because her newly awakened religious conscience forbade continued adherence to the required work schedule. "In [all three] cases, the termination flowed from the fact that the employment, once acceptable, became

religiously objectionable because of changed conditions." Thomas, 450 U.S. at 718.

Two possible objections to the application of Sherbert and Thomas to this case can be raised. Neither objection has any merit.

1. Effect of Bowen v. Roy

The first possible objection to the application of Sherbert and Thomas to this case is the Court's recent holding in Bowen v. Roy, 54 U.S.L.W. 4603 (June 11, 1986). Lawton and the Commission could argue that Hobbie's free exercise claim is analogous to Roy's, and is therefore unprotected. That argument is not supported by the Roy decision.

In Roy, the Court addressed the issue of whether the Free Exercise Clause compels the government to accommodate a religiously-based objection to the statutory

requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits and that the states use these numbers in administering the benefit programs. The Court held, in a plurality opinion, that the Free Exercise Clause did not compel the accommodation requested.

In the course of his plurality opinion, and joined on this point by a solid majority of the Court, Chief Justice Burger explicitly reaffirmed and distinguished Roy from Sherbert and Thomas. The opinion points out that the statutes at issue in both those cases provided:

> that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious

> hardship suggests a discriminatory intent. Thus, as was urged in Thomas, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion. See Brief for Petitioner in 15, and Brief for American Jewish Congress as Amicus Curiae 11, in Thomas v. Review Board, O.T.1979, No. 79-952. See also Sherbert, supra, at 401-402, n.4; United States v. Lee, 455 U.S. at 264, n.3 (Stevens, J., concurring in judgment) (Thomas and Sherbert may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect"). In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.

54 U.S.L.W. at 4607-08. See id. at 4610 (Blackmun, J., concurring in part) ("I think the question requires nothing more than a straight-forward application of Sherbert, Thomas"); id. at 4614 (O'Connor, J., concurring in part and dissenting in part) ("five members of the Court agree that

Sherbert and Thomas...control the outcome of this case"); id. (White, J., dissenting) (Thomas and Sherbert control).

Here, Florida law created a mechanism for individualized exemptions, providing benefits for claimants who refuse employment for compelling personal reasons. See Appellee's Motion at 13-15. But the Commission deemed a termination resulting from an act based on religious belief acquired during the course of employment to be "misconduct connected with work."

The Commission's refusal to pay benefits was, as in Sherbert and Thomas, a refusal "to extend an exemption to an instance of religious hardship suggest[ing] a discriminatory intent", exhibiting "hostility, not neutrality, toward religion." Roy, 54 U.S.L.W. at 4607-08.

Accordingly, the requested benefits must be provided absent a compelling interest to deny the benefits. As in Thomas and Sherbert, the record is devoid of any evidence supporting such a compelling interest.

2. Change of religious conviction during employment

In its Motion to Dismiss or Affirm, the Commission raised as a significant distinction between this case and Sherbert and Thomas the timing of Hobbie's religious awakening. The Commission pointed out that Florida law, Fla. Stat. §443.101(2), permits payment of benefits to claimants who refuse employment for compelling moral reasons, as well as employees whose employers substantially and unilaterally change a material condition of a job. See Appellee's

Motion at 13-15. Thus, the Commission argued, the plaintiffs in Sherbert and Thomas would have received benefits in Florida.

Hobbie is different, the Commission argued, because, unlike Sherbert, she did not refuse employment as an applicant, and because, unlike Thomas, the employer did not substantially and unilaterally change a material condition of her job. Rather, Hobbie changed her religious convictions during the course of employment, and the unacceptability of her working conditions resulted from a self-initiated change. Therefore, the Commission argued, Hobbie falls outside the rule of Sherbert and Thomas.

The argument that the timing of the birth of religious belief is constitutionally relevant -- that an employee who becomes a Sabbatarian while

employed enjoys less right to unemployment benefits or accommodation than a prospective employee who is a Sabbatarian -- is without basis in logic or law. There is no question here that Hobbie's beliefs are sincere, nor is there any assertion that she adopted these beliefs to gain First Amendment protection for benefits otherwise unavailable. Thus, there is no practical reason to distinguish Hobbie from a Sabbatarian seeking employment. Such a distinction serves solely to penalize severely the fundamental free exercise right to explore and adopt new or different

creeds[2].

While there appears to be no Supreme Court precedent directly addressing the constitutional significance of a change in religious belief, Bowen v. Roy suggests that no constitutional significance exists. The relevance of Roy to the vitality of Sherbert and Thomas is discussed above; of particular significance to this point, however, is that Chief Justice Burger's opinion noted that appellee Roy "had recently developed a

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[2] Human history is replete with examples of people like Hobbie, whose religious awakenings occurred in ways that required significant changes in their employment. For an example of a highly dramatic change in ancient times, see 1 Kings 19:19-21 (Oxford Ann. Bible, Rev. St. Version, 1952). ("So [Elijah] departed from there, and found Elisha, the son of Shapat, who was plowing...Elijah passed him by and cast his mantle upon him. And he left the oxen...")

religious objection to obtaining a Social Security number" for his daughter. Roy, 54 U.S.L.W. at 4604 (emphasis supplied). The timing of the development of the religious belief, though noted, did not give rise to a holding that Roy was not entitled to invoke the Free Exercise Clause, nor did it play any role in the Chief Justice's Free Exercise analysis, or in the opinions of any of the concurring or dissenting Justices.

B. Payment of Unemployment Compensation Benefits to Hobbie Would Not Constitute An Establishment of Religion

In Thomas, the Court addressed the issue of whether paying unemployment compensation benefits to an employee who refused work on free exercise grounds constituted an establishment of religion. The Court held that it did not, as any benefit to religion in such circumstances "manifests no more than the tension between

the two Religion Clauses which the Court resolved in Sherbert...." Thomas, 450 U.S. at 719, quoting Sherbert v. Verner, 374 U.S. 398, 409:

> In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.

Appellee Commission urged in its Motion to Dismiss or Affirm that the Court should overrule Sherbert and Thomas, relying in part on the Court's recent decision in Estate of Thornton v. Caldor, 105 S.Ct. 2914 (1985). Caldor, however, requires no such radical overturn of precedent.

In Caldor, the Court held as an unconstitutional establishment of religion a Connecticut statute that provided employees with the absolute right not to work on their Sabbath. Emphasizing the unqualified nature of the statute's preference of religious concerns over secular interests at the work place, the Court concluded that the "unyielding weighting in favor of Sabbath observers over all other interests...has a primary effect that impermissibly advances a particular religious practice." Caldor, 105 S.Ct. at 2918.

Caldor is distinguishable from this case on at least three grounds. First, in Caldor, the statute provided an absolute and unqualified preference for those who observe the Sabbath (but no other religious practices) over others who, for good secular reasons, might have preferred not to work on

weekends. Here, no such absolute and unqualified preference is requested. If Lawson had proved an inability to accommodate without hardship, or if Hobbie had refused a reasonable accommodation, then Hobbie would not be entitled to unemployment compensation. But here, Hobbie was given the stark choice between working according to an inflexible corporate policy or adhering to her religious conscience.

Second, in Caldor, the requested accommodation of religious practice would have deprived other employees of their rights. In this case, by contrast, there is no record evidence that other employees would, in fact, be harmed. On the contrary, the one employee who would appear to be most affected -- her immediate supervisor, the store manager -- actively participated in an apparently successful accommodation effort.

The requested payment of unemployment benefits does no more than provide for a Sabbatarian precisely the same benefits to which others who cannot work for compelling secular purposes are entitled. Rather than Hobbie's request for payment being a preference for religion, the Commission's reading and application of Florida law is a preference for non-religious beliefs. See Roy, 54 U.S.L.W. at 4611 & n. 17 (Stevens, J., concurring).

Moreover, unlike Caldor, Hobbie's request for benefits based on religious beliefs applies not just to Sabbath observance. Rather, Hobbie's request will ensure availability of unemployment benefits to those professing all forms of religious practices (e.g. religious objections to weaponry production, as in Thomas).

Finally, even if the Court's decision in Caldor did mark a change in First Amendment doctrine extreme enough to require a re-examination of the Court's holdings in Sherbert and Thomas -- a view unsupported by the Court's reaffirmation of those cases in Roy -- this is not the appropriate case for such a weighty task. The record in this case provides a wholly inadequate vehicle for searching constitutional analysis, reversal of well-established precedent and profound change in the Court's current jurisprudence of the Religion Clauses.

To begin with, the only opinion in the record below was written by a Referee of Florida's Unemployment Compensation Appeals Bureau; the Commission affirmed his decision without opinion, as did Florida's District Court of Appeal. Thus, the Court must act

without the benefit of a lower court opinion by any state or federal judge. The opinion not only fails to cite a single case either of Florida or federal law in its conclusions of law, but is also woefully deficient in providing a factual record on which the Court could base a significant constitutional decision.

Several key findings, which could provide a non-constitutional, state law basis to dispose of this case, have not been rendered. For example, the Referee made no finding as to whether the employer, Lawson, made any effort whatsoever to accommodate Hobbie. Nor did the Referee find that the shift-swapping accommodation that Hobbie arranged unilaterally with her colleague would or would not cause her employer <u>any</u> hardship, let alone undue hardship.

Even under the relatively strict standards of Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), Lawson owed Hobbie some effort to accommodate if it could do so without undue hardship. To hold otherwise would provide employers with sole discretion to determine whether to accommodate, without any review by any impartial state or federal tribunal. This would result in totally eviscerating the protections of Title VII, 42 U.S.C. §2000 et seq. and state cognates, and leaving Sherbert and Thomas as mere empty shells. If those facts could be proved -- and on these points the record is silent -- then there might well be no need to reach

any constitutional issues[3].

The record in this case is deficient enough that the Court could well decide not to reach the merits, see Int'l Brotherhood of Teamsters v. Denver Milk Producers, 334 U.S. 809 (1941). At a minimum, the record is sufficiently incomplete as to give the

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[3] The opinion states in its conclusions of law that the "employer's testimony has established that [Hobbie's unilateral shift-swapping accommodation effort] could not be guaranteed as being of a permanent nature and that it would not interfere with the rights of the other employees in the store." Appendix 3a (emphasis supplied). Such a finding, while unclear, suggests that the employer made no effort to assist Hobbie in reaching a mutually satisfactory accommodation, contrary to Hardison's requirement.

Moreover, the notion that a proposed accommodation must be of a nature that it can guarantee, before implementation, no costs or hardships to an employer goes far beyond the requirements of Hardison. And in Hardison, the Court found undue hardship based upon a record which fully explored all of the proposed accommodations and their costs to TWA.

Court serious pause before making it a vehicle for a reconsideration of precedent. See Reserve Army v. Municipal Court, 331 U.S. 549 (1947) (Court follows policy of "strict necessity" in disposition of constitutional issues); see also Bowen v. Roy, 54 U.S.L.W. 4603, 4611-12 & n.18 (Stevens, J., concurring).

CONCLUSION

For the reasons indicated above, amici respectfully urge that the judgment below be reversed.

Respectfully submitted,

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